NO. 21115

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAYETANO JOHN REYES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, Cayetano John Reyes, was indicted on January 5, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This indictment, which consisted of one count, charged appellant with the robbery of a national bank by force, violence, and intimidation, in violation of Section 2113(a) of Title 18, United States Code [C. T. 2].

Appellant was arraigned and entered a plea of not guilty as

1/ C. T. 2; "C. T." refers to Clerk's Transcript of Proceedings.

charged in the indictment, on January 17, 1966 [C. T. 3].

Trial to a jury commenced on February 7, 1966, with the Honorable Roger D. Foley, United States District Judge, presiding [C. T. 20]. On February 8, 1966, the jury returned a verdict of guilty as charged in the indictment [C. T. 19, 21].

On April 1, 1966, Judge Foley sentenced appellant to imprisonment for a period of ten years [C. T. 22].

Notice of appeal was filed on April 11, 1966 [C. T. 23-24], and permission to proceed in forma pauperis was granted on April 25, 1966 [C. T. 25].

The District Court had jurisdiction of the cause under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATEMENT OF FACTS

On June 11, 1965, the Bank of America, Wabash-Sentinel Branch, in Los Angeles, California, a national bank and a member bank of the Federal Reserve System whose deposits were insured by the Federal Deposit Insurance Corporation, was robbed by a man who claimed to be carrying a gun and a gas bomb [R. T. 20-28, 102].[2/] This bandit plundered the bank of $2,155.00 [R. T. 32].

2/ "R. T." refers to Reporter's Stenographic Transcript.

In making his escape, however, the robber left the holdup note with his victim teller, Miss Carmen Sicre, and at the trial both the handwriting and fingerprints on the note were identified as belonging to appellant, Cayetano John Reyes [R. T. 56, 74].

In the month prior to the robbery, an acquaintance of appellant, one Gilbert Sandoval, had a conversation with the appellant during which one Mario DeSantiago was present, wherein appellant Reyes told Sandoval that Reyes needed money, and asked Sandoval to "pull" a bank robbery with him [R. T. 77-78].

A subsequent conversation took place in the first or second week of June, again at Sandoval's apartment, and during which Mario DeSantiago was again present, along with appellant Cayetano Reyes and his younger brother, Fernando Reyes. At this time appellant Reyes told Sandoval that the appellant "wanted to go pull a robbery" on Atlantic Blvd. in East Los Angeles [R. T. 79].

Appellant returned later that day and told Sandoval that he had decided to rob the bank on Wabash instead of the one in East Los Angeles [R. T. 81]. Appellant held some withdrawal slips upon which he proposed to write "a threatening note" [R. T. 81]. After writing a note which was approved by his brother Fernando, and by Mario DeSantiago, appellant showed the note to Sandoval [R. T. 81]. This was the note which was subsequently used in the bank robbery [R. T. 81-82].

Appellant, together with Fernando Reyes and Mario DeSantiago, left Sandoval's apartment about 2:30 P. M. [R. T. 82] and sometime between 3:00 and 3:30 that afternoon, Sandoval drove

past the Bank of America on Wabash, where he saw a scurry of police cars and police officers rushing to the bank [R. T. 83].

That evening, appellant denied to Sandoval that he robbed the bank [R. T. 84]. However, Sandoval had a subsequent conversation with appellant wherein appellant admitted that he had indeed committed the looting, and he proceeded to give Sandoval $75 of a $150 debt which appellant previously owed Sandoval [R. T. 85-86].

At the trial, the defense called appellant's wife, Barbara Mae Reyes, as its first witness. Mrs. Reyes testified that her husband had been using narcotics heavily up until the time of his arrest [R. T. 120-121, 124-125]. Appellant supported her and the children by selling narcotics [R. T. 129], up until the month of June when, "all of a sudden we weren't getting any more money from what he was selling, and I do know he didn't have any money at that time because we were borrowing from his Mom" [R. T. 127].

Sometime on the afternoon of June 11, the appellant gave his wife a fifty-five dollar ring set [R. T. 129, 139].

III

ARGUMENT

THE HOLDUP NOTE, THE PHOTOGRAPH OF THE HOLDUP NOTE, AND THE ENLARGEMENT MADE OF THE PRINTING ON THE HOLDUP NOTE, WERE ALL PROPERLY RECEIVED INTO EVIDENCE.

A. THERE WERE SUFFICIENT FACTS TO ESTABLISH A PRIMA FACIE SHOWING OF THE HOLDUP NOTE'S IDENTITY, WITHOUT PRODUCING EVERYONE IN THE CHAIN OF CUSTODY.

Government's Exhibit No. 1 was a Bank of America withdrawal slip from the Wabash and Sentinel Branch, upon which the following words were hand printed: "This is a hold up act natural . . . Have a gas bomb and gun . . . Don't make me use it."

The bandit left this note with the victim teller, Carmen Sicre, who turned it over to the manager, Mr. Frank L. Russoe [R.T. 25-26, 31]. Manager Russoe gave the note to Sgt. Lloyd G. Neal of the Los Angeles Police Department [R.T. 33], who retained it until booking the note into evidence on June 11, 1965, at the Central Division Property Section [R.T. 35].

Mr. James Watson, Senior Photographer for the City of Los Angeles assigned to the Criminalistic Section of the Los Angeles Police Department, received the note from a Sgt. Massaro of the latent fingerprint section, and photographed it in its natural state [R.T. 42], before turning it over for chemical analysis to bring

out the fingerprints [R. T. 43].

This photograph of the original note became Government's Exhibit No. 1-A, and was identified by both the victim teller and the photographer as being the photograph of the original holdup note [R. T. 24, 43].

An enlargement of the hand-printing found on the holdup note [Government's Exhibit No. 1] was made from the photograph of the holdup note [Government's Exhibit No. 1-A], and this enlargement was received into evidence as Exhibit No. 6 [R. T. 74].

Appellant contends that because "Sergeant Massaro was never called as a witness by the government in this case to testify regarding his handling, possession, custody, and processing" of the holdup note, neither the holdup note, the photograph of the holdup note, nor the enlargement of the printing on the holdup note [Government's Exhibits Nos. 1, 1-A, and 6] should have been received into evidence.

Continuous custody is certainly not the exclusive way that identity can be proved. In the case of fungible goods, for example, heroin, it may be an effective means of showing that the evidence used at trial is the same substance that was connected with the offense. But where the evidence is as unique and identifiable as a hand-printed holdup note, continuous custody would hardly be required.

As Wigmore says, in 2 Evidence (3rd Ed.) Section 411:

> "Where a certain circumstance, feature, or mark, may commonly be found associated with a large

number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity because, on the general principle of Relevancy (ante §31), the other conceivable hypotheses are so numerous, i.e., the objects that possess that mark are numerous and therefore any two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are 'nil' or are comparatively small." [Emphasis added.]

Before a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that it is the same object which was so involved in the crime. This determination is to be made by the trial judge. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. The trial judge's determination that the showing as to identification is sufficient to warrant reception of an article into evidence may not be overturned except for a clear abuse of discretion. Gallego v. United States, 276 F.2d 914, 917 (9 Cir. 1960).

Once the trial judge is satisfied that a prima facie showing has been made, the evidence may be admitted, even though every

custodian has not been produced, and the ultimate issue of identification is then left to the jury. Burris v. American Chickle Co., 120 F. 2d 218 (2 Cir. 1941).

Therefore, the issue in this case is whether there were sufficient facts to establish a prima facie connection and identity between these exhibits and the holdup note used in the bank robbery, without the testimony of Sgt. Massaro.

In this case there exists a plethora of uncontradicted facts concerning the identity of the holdup note. The victim teller, the Bank Manager, and Police Sergeant Neal, all identified Mr. Watson's photograph of the holdup note, Exhibit No. 1-A [R. T. 43], as being a photograph of the holdup note used in the robbery [R. T. 24, 31, 35]. Gilbert Sandoval testified that Exhibit 1-A was a photograph of the note he had watched appellant write and had heard appellant say he was going to use in his robbery of the Wabash-Sentinel Branch of the Bank of America, on the same afternoon, a robbery which appellant later admitted perpetrating [R. T. 81-82, 85]; and there was no indication that the note was ever out of Police custody. Sergeant Neal testified that the note was signed into Property Division and "from that time on Property Division assumes complete control of the evidence." [R. T. 35-36].

It is submitted, therefore, that the trial court was presented with sufficient facts to establish a prima facie connection and identity between these exhibits and the holdup note used in the bank robbery, without the further testimony of one of the policemen who had had possession of the note, Sergeant Massaro. Burris v.

American Chickle Co., supra.

B. THE RECORD DISCLOSES NO HEARSAY TESTIMONY OF SERGEANT MASSARO.

Appellant also contends that "by the denial of the right of confrontation with Sergeant Massaro and the admission of this evidence, Exhibits #1 and #1-A, the court allowed inadmissible hearsay testimony." [Appellant's Opening Brief, p. 20]. Nowhere does appellant's brief set out any hearsay testimony of Sergeant Massaro which allegedly was erroneously admitted, nor, indeed, does appellee's search of the record disclose the existence of any such testimony.

Appellant states that "that portion of the evidence, namely the latent fingerprints obtained by chemical reaction performed by Sergeant Massaro amounted to admission of hearsay evidence and is inadmissible as stated above." [Appellant's Opening Brief, p. 21].

There was no evidence in the trial court that Sergeant Massaro performed any chemical tests. The only mention of Sergeant Massaro was that the photographer, Mr. Watson, received the holdup note from Massaro in its natural state [R. T. 42], and after photographing it, gave it "to some other member of the staff there in the laboratory for chemical treatment to bring out the fingerprints." [R. T. 43]. Mr. Watson further testified that the chemical treatment was performed to Watson's own knowledge [R. T. 43]. There was never any testimony that Sergeant Massaro conducted

any chemical tests.

Additionally, it should be noted, nowhere does the record disclose any request by appellant for a subpoena to issue that would bring Sergeant Massaro to court. There never was a request for a continuance, by appellant, so that Sergeant Massaro's testimony could be elicited. Nor is there any indication that, had appellant requested the presence of Sergeant Massaro, the request would have been denied.

IV

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.
Assistant U. S. Attorney

APPENDIX

TABLE OF DISPUTED EXHIBITS

EXHIBIT NO. 1: Original holdup note.

EXHIBIT NO. 1-A: Photograph of original holdup note.

EXHIBIT NO. 6: Enlargement of handprinting on original holdup note.

	IDENTIFIED	OFFERED	RECEIVED
Ex. No. 1:	R.T. 23-25 35, 42-44	R.T. 64	R.T. 67
Ex. No. 1-A:	R.T. 23-25, 31, 35, 42-43, 61-62	R.T. 64	R.T. 67
Ex. No. 6:	R.T. 63-64, 70	R.T. 74	R.T. 74